



FEMA

November 18, 2009

BY HAND-DELIVERY

Clerk of the Board
Civilian Board of Contract Appeals
1800 M Street, N.W.
6th Floor
Washington, D.C. 20036

BOARD OF
CONTRACT APPEALS

2009 NOV 18 P 2:38

RECEIVED

gm

DOCKET NUMBER: CBCA-1761-FEMA

Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by Sewerage and Water Board of New Orleans and filed as CBCA-1761-FEMA. Submitted with the Response is a binder(s) of exhibits.

Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to the arbitration hearing: Linda M. Davis, Associate Chief Counsel – Program Law Division, 202-646-3327 or lindam.davis@dhs.gov; and Kim A. Hazel, Senior Counsel – Program Law Division, 202-646-4501 or kim.hazel@dhs.gov.

Very truly yours,

John B. Patterson
John B. Patterson

General Attorney
Office of Chief Counsel
DHS/Federal Emergency Management Agency
500 C St., S.W.
Washington, D.C. 20472



FEMA

November 18, 2009

BY HAND-DELIVERY

Clerk of the Board
Civilian Board of Contract Appeals
1800 M Street, N.W.
6th Floor
Washington, D.C. 20036

DOCKET NUMBER: CBCA-1761-FEMA

Dear Sir or Madam:

Please find attached the Response of Federal Emergency Management Agency (FEMA) to the arbitration request submitted by Sewerage and Water Board of New Orleans and filed as CBCA-1761-FEMA. Submitted with the Response is a binder(s) of exhibits.

Please add the following Office of Chief Counsel contacts for all notices and correspondence to FEMA related to the arbitration hearing: Linda M. Davis, Associate Chief Counsel – Program Law Division, 202-646-3327 or lindam.davis@dhs.gov; and Kim A. Hazel, Senior Counsel – Program Law Division, 202-646-4501 or kim.hazel@dhs.gov.

Very truly yours,


John B. Patterson
General Attorney
Office of Chief Counsel
DHS/Federal Emergency Management Agency
500 C St., S.W.
Washington, D.C. 20472

cc: To the Applicant:

Mr. Jason Higginbotham, LEM
Director of Emergency Management
Sewerage and Water Board of New Orleans
635 St. Joseph Street
New Orleans, LA 70165

To the State:

Mr. Paul W. Rainwater
Governor's Authorized Representative
Governor's Office of Homeland Security and Emergency Preparedness
7667 Independence Boulevard
Baton Rouge, LA 70806

To the Region:

Mr. Gary Jones
Acting Regional Administrator
800 N. Loop 288
Denton, TX 76209

**Sewerage and Water Board of Louisiana
Corrosion Damage to East Bank Waste Water Treatment Plant Components
(Clarifiers), PW 4031v 3
FEMA-1603-DR-LA
Docket # CBCA 1761 - FEMA**

**RESPONSE OF THE FEDERAL EMERGENCY MANAGEMENT AGENCY TO
ARBITRATION REQUEST OF SEWERAGE AND WATER BOARD OF NEW
ORLEANS, LOUISIANA**

On October 19, 2009, the Federal Emergency Management Agency (FEMA) received the request of Sewerage and Water Board of New Orleans, Louisiana to arbitrate FEMA's denial of \$2,312,500 for the repair and replacement of major steel components of the East Bank Waste Water Treatment Plant (EBWTP) clarifiers. This constitutes FEMA's response to the arbitration request by the Applicant.

ARBITRATION PANEL JURISDICTION

The Sewerage and Water Board of New Orleans (SWBNO, S&WB, or Applicant) has met the regulatory guidelines for filing an arbitration request as outlined in 44 C.F.R. § 206.209 as follows:

- Project Worksheet (PW) 4031, through various versions, represents eligible damage to SWBNO and is considered by FEMA to be one Project.
- FEMA responded to the Applicant's first appeal on February 10, 2009.
- The Grantee, on behalf of the Applicant, filed a second appeal on June 17, 2009.
- The arbitration request was filed by letter dated October 15, 2009, with supporting documentation.

- All pending appeals were withdrawn as stated in the Applicant's arbitration request letter dated October 16, 2009.
- The Applicant has met the October 30, 2009, arbitration request submittal deadline.
- The arbitration request for \$2,312,500 exceeds the \$500,000 project threshold.

SUMMARY OF FEMA'S POSITION

The additional funding sought by the Applicant for the restoration of major structural steel components of eight clarifiers at its EBWTP facility is not eligible under the FEMA Public Assistance program. Corrosive damage to the steel components was not the result of the declared disaster event. Rather, widespread corrosive damage of these components was due to pre-disaster deferred maintenance. As such, costs to restore the clarifiers' major structural steel components are not eligible for reimbursement under the Public Assistance program. See 42 U.S.C. § 5172.

BACKGROUND

Public Assistance and the Stafford Act

FEMA, a component agency of the United States Department of Homeland Security, is responsible for, among other duties, administering and coordinating the Federal governmental response to Presidentially declared disasters pursuant to the Robert T. Stafford Disaster Relief and Emergency Assistance Act ("Stafford Act").¹ See 42 U.S.C. §§ 5121 *et seq.* The Stafford Act is triggered when, at the request of the governor of a state, the President declares an affected area to be a "major disaster." See 42 U.S.C. § 5170; 44 C.F.R. §§ 206.36; 206.38. Once a disaster is declared, the President determines the types of discretionary assistance that may be made available in the declared-area. See 42 U.S.C. § 5170.

On August 29, 2009, the President issued a major disaster declaration for the State of Louisiana as a result of Hurricane Katrina, pursuant to his authority under the Stafford Act. See 42 U.S.C. § 5170. This declaration authorized all categories of Public Assistance, including permanent restoration of public facilities. See Exhibit 1. Permanent restoration of public facilities includes funding for either repair or replacement of eligible facilities on the basis of the design, function, and capacity of such facilities, as they existed immediately prior to a major disaster declaration. See 42 U.S.C. § 5172; 44 C.F.R. § 206.226. The President's declaration included Orleans Parish, which includes the Sewerage and Water Board of New Orleans, making it eligible to apply for FEMA Public Assistance for reimbursement of eligible emergency and permanent restorative work.

¹ The Stafford Act authorizes FEMA to promulgate rules and regulations necessary to carry out the provisions of the Stafford Act. 42 U.S.C. § 5164.

Under the Stafford Act, FEMA may provide, *inter alia*, Public Assistance. The Stafford Act states that FEMA “may make contributions” for the repair, restoration, and replacement of damaged facilities. See 42 U.S.C. § 5172. Public Assistance (“PA”) allows FEMA, in its discretion, to provide disaster assistance to states, local governments, and certain non-profit organizations if FEMA determines that the applicant, facility, and work meet eligibility requirements. See 44 C.F.R. §§ 206.200-.206. PA funding can be provided in the form of grants for the state or local government’s own recovery efforts, or FEMA may fund direct federal assistance through which a federal agency performs the recovery work. See 44 C.F.R. §§ 206.203, 206.208. FEMA may also fund eligible private nonprofit facilities, such as educational facilities or schools, through a subgrantee basis. See 44 C.F.R. § 206.223(b).

To receive PA, the applicant must own or operate an eligible facility as defined by FEMA regulations, the facility must be damaged in a declared major disaster, the facility must be within the disaster declared-area, and the facility must be the legal responsibility of the eligible applicant. See 42 U.S.C. § 5122; 44 C.F.R. §§ 206.221-.223; 206.226(c)(1). With PA, a federal inspection team accompanied by a local representative surveys the damage and estimates the scope and cost of necessary repairs. See 44 C.F.R. § 206.202(d). The inspectors record the information they gather on Project Worksheets (“PWs”). Id. PWs estimate damage caused by the disaster, whether the damage is eligible for PA, and list, among other information, the scope and “quantitative estimate for the eligible work.” Id.

After completion, FEMA reviews the PW in order to make determinations of whether to approve funding for eligible work. Id. Thereafter, FEMA may make Federal disaster assistance funds available (*i.e.*, “obligate”) based on the final PW. See 44 C.F.R. § 206.202(e). A PW is not a contract between FEMA and the State and/or subgrantee to pay Federal disaster assistance and does not create any right to receive any such Federal funds. See 44 C.F.R. § 206.202(d). A PW only provides estimates, based upon the engineering analysis and on-site investigation, of the anticipated cost of a project. See id. § 206.202(e); Gardiner v. Virgin Islands Water & Power Auth., 145 F.3d 635 (3rd Cir. 1998) (providing that required authorization cannot be implied for contracts in emergency situations as specific steps are required to bind the United States).

The State of Louisiana is the grantee for all FEMA Public Assistance delivered in the State. See 44 C.F.R. § 206.201(e). The Sewerage and Water Board of New Orleans is a subgrantee of the State. See 44 C.F.R. § 206.201(l).

Sewerage and Water Board of New Orleans – East Bank Wastewater Treatment Plant Clarifiers

The Applicant provides sewerage and water services throughout Orleans Parish, Louisiana, including the City of New Orleans. As a result of Hurricane Katrina, a 17-foot storm surge overtopped the berm surrounding the East Bank Wastewater Treatment Plant (EBWTP) and caused extensive damage to the plant. The EBWTP employs eight (8)² clarifiers, which were submerged under brackish water from Lake Pontchartrain for a period between 45 to 75 days. The basic function of a clarifier is to process the wastewater-biomass slurry and separate the liquids from the solids. This allows the liquid medium and the solids to be treated with separate processes. Approximately eighty (80) percent of the structural steel components of the clarifiers are normally operating submerged within the sewage medium.

The Sewerage and Water Board of New Orleans applied to FEMA for reimbursement under the Public Assistance program. In early February 2006, FEMA began inspecting the Applicant's EBWTP facility, including its clarifiers. At this time, the Applicant presented to FEMA an estimate of \$5,600,000 to repair the clarifiers. During the inspection, FEMA observed widespread corrosive damage to the major steel clarifier components. FEMA made a determination that the cause of the corrosive damage was long-term deterioration resulting from lack of pre-disaster maintenance. See Exhibit 3.

In April 2006, based on a re-inspection of the clarifiers, FEMA determined a portion of the costs sought by the Applicant were eligible under the PA Program and approved funding in the amount of \$1,887,794. See Exhibit 4. This PW reimbursed the Applicant for items of work

² See Exhibit 2, Aerial photo and site layout.

including: cleaning expenses, replacement of electrical control panels, wiring and other mechanical components not designed to be immersed in liquid. Id. The FEMA cost share changed in April 2006 from 90% to 100% federal share. As a result of the increased federal share, FEMA rewrote PW 4031 v2. See Exhibits 5 and 6.

On August 27, 2007, in response to the Applicant's request for an additional \$2,312,500 FEMA prepared PW 4031v3. See Exhibit 7. This PW noted that the protective coating on the steel clarifier components failed due to lack of pre-disaster maintenance, resulting in widespread corrosion. FEMA denied Applicant's request for additional funding because the damage was not disaster-related. On June 17, 2008, FEMA approved additional funding for cost over-runs associated with the restoration of the clarifiers. See Exhibit 8. Eligible items of work included cleaning expenses, electrical repairs, launder bracket repairs, and labor fees for Applicant's contractor, Veolia Water North America.

Appeals and Arbitration

The Stafford Act authorizes appeals of PA assistance decisions. See 42 U.S.C. § 5189(a). There are two levels of appeal — the first to the Regional Administrator, the second to the Assistant Administrator for the Disaster Assistance Directorate. See 44 C.F.R. § 206.206(b). The American Recovery and Reinvestment Act of 2009, P.L. 111-5, establishes a new option for arbitration under the PA program for award determinations related to Hurricanes Katrina and Rita under major disaster declarations DR-1603-LA, DR-1604-MS, DR-1605-AL, DR-1606-TX, and DR-1607-LA. See 44 C.F.R. § 206.209. A decision of a majority of this Panel constitutes

the final decision, binding on all parties, and is not subject to judicial review, except as permitted by 9 U.S.C. § 10. See 44 C.F.R. § 206.209(k)(3).

PROCEDURAL HISTORY

First Appeal

In a letter dated June 4, 2008, the Applicant filed a first-level appeal with FEMA requesting an additional \$2,312,500 for what it claimed was disaster-related damage to the steel clarifier components. See Exhibit 9. In support of its appeal, the Applicant submitted four technical publications addressing the corrosive effects of saltwater and microbiological agents on steel. Specifically, the Applicant requested that FEMA accept these publications as proof that damage to the clarifiers' major steel components resulted from their submersion in corrosive floodwaters for a period of 45-75 days. On February 10, 2009, the Acting Regional Administrator denied the first appeal because corrosion of the clarifiers' major steel components was not disaster related. See Exhibit 10.

Second Appeal

On April 23, 2009, the Applicant filed a second-level appeal with FEMA disagreeing that damage to major steel clarifier components was not disaster-related. See Exhibit 11. On October 16, 2009, the Applicant withdrew its second appeal request in favor of pursuing Arbitration pursuant to 44 C.F.R. § 206.209. See Exhibit 12.

Request for Arbitration

The Applicant now files this Request for Arbitration seeking \$2,312,500 for the restoration of the major structural steel components of eight clarifiers at its EBWTP facility.³ The Applicant argues that corrosive damage to the steel clarifier components was disaster-related. Here, again, FEMA confronts the Applicant's almost total reliance in making its case for disaster-related damage on technical studies, which address the corrosive effects of salt water and microbiological agents on metals.

In an October 29, 2009 letter, the Governor's Office of Homeland Security and Emergency Preparedness (GOHSEP) submitted a written recommendation in support of the Applicant's Request for Arbitration pursuant to 44 C.F.R. § 206.209 (e) (3). See Exhibit 13.

³ The Applicant received two bid quotes totaling \$2,312,500. See Applicant Exhibits 00754 and 00755.

STANDARD OF REVIEW

The standard of review of the Agency's actions in this matter is the arbitrary and capricious standard. See five U.S.C. § 706(2)(A). As such, the Panel must affirm FEMA's final decision unless it is arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law. 5 U.S.C. § 706(2); Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 415 (1971); Friends of the Earth v. Hintz, 800 F.2d 822, 830-31 (9th Cir. 1986). A final agency decision is entitled to a presumption of regularity and must be upheld as long as there is a rational basis for it. Citizens to Preserve Overton Park v. Volpe, 401 U.S. at 415; Friends of the Earth v. Hintz, 800 F.2d at 831.

A court's review under the APA is generally confined to the administrative record presented by the agency to the reviewing court. See Florida Power & Light Co. v. Lorion, 470 U.S. 729, 744 (1985). The fact that an administrative record may contain disputed issues concerning judgments, opinions, and conclusions does not preclude summary judgment in favor of the agency. Bertolucci v. San Carlos Elem. School Dist., 721 F. Supp. 1150, 1153 (N.D. Cal. 1989). An agency's determination may be overturned only if the Court finds that a reasonable mind could not view the evidence on which the agency relied as adequate to support the agency's conclusion. See id. The Court reviews an agency's conclusions of law de novo, while according deference to the agency's reasonable construction of the applicable statute and regulations.

Under the “highly deferential” standard of APA review, a court “may not substitute [its] judgment for that of the agency” but instead will presume “the agency action to be valid and [will affirm] the agency action if a reasonable basis exists for its decision.” Kern County Farm Bureau v. Allen, 450 F.3d 1072, 1075-76 (9th Cir. 2006) (internal citations omitted).

Considerable deference must be afforded to FEMA’s interpretation of the statutory scheme it has been entrusted to administer, and to its own regulations. See Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844 (1984); Udall v. Tallman, 380 U.S. 1, 16-17 (1965) (explaining that the “ultimate criterion is the administrative interpretation, which becomes of controlling weight unless it is plainly erroneous or inconsistent with the regulation”); Hawaiian Elec. Co., Inc. v. E.P.A., 723 F.2d 1440, 1447 (9th Cir. 1984).

DISCUSSION AND ANALYSIS

A major disaster is by definition an event for which Federal assistance is necessary “to supplement the efforts and available resources of States, local governments, and disaster relief organizations in alleviating the damage, loss, hardship, or suffering caused thereby.” See 42 U.S.C. § 5122(2). Federal disaster assistance under the Stafford Act includes “repair, restoration, and replacement” of disaster-damaged public facilities on the basis of the design, function, and capacity of such facilities as they existed immediately prior to the major disaster. See 42 U.S.C. §5172 (a) (1) (A). Under the PA program, this category of assistance is commonly referred to as permanent work. A threshold eligibility requirement for permanent work funding is that such work be required as a direct result of the declared major disaster event.

See 44 C.F.R. § 206.223 (a) (1). Damage that results from a cause other than the designated event, such as a pre-disaster damaging event, wear and tear, post disaster damaging event, or other inadequacies that existed prior to a disaster, is not eligible. See PA Guide, FEMA 322 (1999) at 29. Further, “normal maintenance items that existed prior to the disaster, ...; and deferred maintenance..., are not eligible because they do not meet the criterion of being disaster-related.” See PA Guide, FEMA 322 (1999) at 33. Finally, “it is the applicant’s responsibility to show that damage is disaster related.” Id. at 33.

Damage to the Clarifier Steel Components is Not Disaster-Related

The Applicant argues that damage to the steel clarifier components is disaster related. As argued more fully below, the Applicant has failed to show that this damage was disaster-related. Applicant’s request for \$2,312,500 must for that reason be rejected as required by the Stafford Act, its implementing regulations, and applicable policy.

In early February, 2006, FEMA conducted a comprehensive site assessment of the EBWTP to determine disaster-related damage. A professional metallurgist with 28 years experience led FEMA’s damage assessment team. See Exhibit 14. During this assessment, the FEMA inspection team observed widespread corrosion of the steel clarifier components indicative of age and pre-disaster deferred maintenance.⁴ See Exhibit 15. Based on the inspection team’s observations, FEMA determined that funding to repair the heavily corroded clarifier components was ineligible because the disaster, the floodwater, did not cause the

⁴ The Applicant provided photos of the corrosive damage with its first-level appeal.

corrosion. As discussed above, under the PA Program, as created by Congress, damage that is not directly attributable to a disaster event is not eligible. See 44 C.F.R. § 206.223 (a) (1).

The Applicant is challenging FEMA's decision to deny additional funding for repairing the clarifiers, stating that FEMA failed to "adequately review and evaluate all available information" and based its decision on "unfounded opinions." See Applicant's Request at 6. FEMA rejects these unfounded Applicant assertions. In fact, FEMA has reviewed and evaluated all pertinent information and based its determinations on full consideration of such information, as well as on applicable law.

PW4031v3 was prepared by a Civil Engineer with 33 years experience in the wastewater industry. See Exhibit 16. FEMA's decision to deny funding for the clarifiers was based on visual and documentary evidence that led FEMA reasonably to conclude that the cause of damage to the steel clarifier components was not disaster-related. Following those advised decisions, the Regional Administrator upheld the decision on first level appeal. See Exhibit 10.

By law, FEMA has sole responsibility for determining eligible scope of work and cost. See 42 U.S.C. § 5172 (a) and (b). The Applicant has not submitted any information, new or otherwise, to substantiate its claim that widespread corrosive damage to the steel clarifier components is disaster-related. FEMA's preparation of PW4031v3 – and its decision to affirm the determination on first appeal – is reasonable and should be accorded deference.

I. Technical Reports Submitted by Applicant Do Not Establish That Damage to the Steel Clarifier Components is Disaster-Related

The Applicant relies solely on four “professional papers” dealing with the corrosive effects salt water, microbial organisms, and other corrosive agents have on metal in asserting that damage to the clarifier components was disaster-related. See Applicant Exhibits 00259-00281; 00282-00287; 00288-00297; 00298-00304. Although interesting reading, the Applicant’s claim that the advanced level of corrosion observed by the FEMA inspection team was disaster-related is simply not credible. For instance, data within one of the “professional papers” submitted by the Applicant clearly shows that steel subjected to immersion in seawater for a 45-75 day period, could not have degraded (corroded) even near the degree observed by FEMA’s inspection team.

The Applicant submitted a report entitled “Corrosion of Metal in Marine Environments - An Overview”. See Applicant Exhibit 00259-00281. FEMA consulted a corrosion expert to assess this report and provide an opinion relative to the Applicant’s claim that widespread corrosive damage to the steel clarifier components was attributable to the disaster. Based on review of the report, the corrosion expert concluded that **“even though the corrosive effects of the media after hurricane Katrina most likely increased during the 45-75 days of exposure as compared to the prior years that the plant was in service, the amount of corrosion that would have taken place, if the coating was damaged during the hurricane, even in the worst conditions, would be negligible.”** See Exhibit 17.

Specifically, the corrosion expert determined that “if this corrosion rate [60 mils per year] was applied to the maximum number of days the clarifiers were underwater (75) this would equate to

a maximum pit depth of approximately 12 mils, which is less than 1/64".⁵ While FEMA does not dispute that some *de minimus* level of corrosion conceivably occurred to the clarifiers as a result of the disaster, based on scientific data and opinion, one should reasonably conclude that this is not significant enough corrosion to warrant the repair or replacement of the steel clarifier components.

The visual observations and opinions of those with decades of professional expertise in the areas of engineering, metallurgy and disaster damage assessments led FEMA to reasonably conclude that the corrosive damage to the steel clarifier components was not attributable to the disaster. Instead, FEMA determined this damage to be the result of prolonged pre-disaster deferred maintenance, coupled with 30 plus years of exposure to a corrosive environment natural to the every-day use of the equipment.

In support of the Applicant's arbitration request, GOHSEP references a January 17, 2006, "draft" report by Dr. Jean Mattei, previously submitted to FEMA by the Applicant in its first appeal request. See Grantee's Recommendations at 4. In this report, titled "Structural Assessment of the New Orleans Eastbank WWT Plant," Dr. Mattei opines that "most damage to the plant may be attributed to long term flooding of the plant by salt water." See Exhibit 19. FEMA does not dispute this statement. In fact, FEMA provided a total of approximately \$52,590,215.00 to fund repairs to the entire EBWTP facility. See Exhibit 20. Expressed as a percentage of overall

⁵ To compute 'mils' measurements into a more recognizable 'inches' measurement the following conversion is needed. See Exhibit 18 for conversion tables from mils to inches. Note that 12.33 mils converts to 0.01233 inches and since 1/64" equals 0.0156 inches; the amount of corrosion is less than 1/64". Therefore, based on the report finding, the amount of pitting that can occur in 75 days is not even 1/64" and thus would be not be discernible to the naked eye.

damage identified by FEMA, this constitutes approximately 96% of damage to Applicant's facility.⁶ This is consistent with Dr. Mattei's opinion that "most" [not all] damage at the Applicant's facility is attributable to the disaster.

Public Assistance applicants are responsible for showing that damage to their facilities is disaster-related. 44 C.F.R. § 206.202(d). The Applicant has not submitted any information or documentation to substantiate its argument that corrosive damage to the steel clarifier components is a direct result of the disaster, even when after early stages of this dispute the Applicant might well have provided new supporting information, should such exist. What remains to be considered is largely those four technical reports, and the technical reports submitted early on by the Applicant, which do not establish that widespread corrosive damage to its clarifiers, as observed by FEMA's damage assessment team, could be directly attributable to the disaster. FEMA's determination that damage to the steel clarifier components is not disaster-related is reasonable and in accordance with the Stafford Act, its implementing regulations, and policy. As such, FEMA's determination should be accorded deference by this Panel.

II. Damage to the Steel Clarifier Components is the Result of Pre-Disaster Lack of Maintenance

The Applicant's claim that it has "never been in the habit of deferring maintenance and crucial repairs and strenuously object to any assertion to the contrary." That statement is not credible given visual observations by FEMA's inspection team, scientific data, and information obtained from public documents.

⁶ FEMA-funded repairs (\$52,590,215) represent 96 percent of the total "damage" (\$52,590,215 plus \$2,312,500) to the plant.

The United States Environmental Protection Agency (EPA) conducted a study in 1991 of sewage treatment plants around the country, including the Applicant's East Bank Sewage Treatment Plant. See Exhibit 21. The EPA study indicates that the Applicant's plant was originally built in 1963, and expanded in 1980. EPA's report identified severe corrosion observed throughout the facility as follows:

- "Plant headworks at the East Bank plant had severe corrosion in the screen and grit basins." Id. at 2.23.
- "The side walls of the grit chamber were severely corroded." Id. at 2.23.
- "Severe corrosion was also observed at the effluent end of the grit box where the wastewater spills into a channel which led it the pure oxygen sludge tanks." Id. at 2.23.
- "Many of the components of the screens had rusted and the metal frames on which they were attached were corroded along with the concrete below the frames." Id. at 2.23.
- "Corrosion of the instrumentation and controls was found to be severe at the East Bank plant." Id. at 2.23.
- **"The plant does not have any control measures to prevent future corrosion. No efforts have been made to rehabilitate the corroded structures. The plant has a limited budget and does not plan to employ rehabilitation of structures as a corrective action until there is failure."** Id. at 2.23.
- "No efforts being taken to rehabilitate the degraded structures. No rehabilitative techniques have been employed to correct the odor and corrosion problems." Id. at 2.24.

- “All of the 87 lift stations employed in the collection systems for the East Bank and West Bank plants are in some stage of corrosion.” Id. at 2.24.

These are but a few EPA findings that contradict the Applicant’s claim that it “has never been in the habit of deferring maintenance and crucial repairs.”

Lack of overall maintenance at the Applicant’s EBWTP facility is also mentioned in a 1998 Consent Decree stemming from a civil complaint by EPA against the Applicant for non-compliance with federal Clean Water Act and Clean Air Act requirements. In the Decree, reference is made to the Applicant’s **“failing to properly operate and maintain the treatment and control facilities and systems at the East Bank Plant...”** See Exhibit 22 at 4. The Consent Decree is mentioned in an April 8, 1998, Department of Justice press release, which noted that “today’s settlement resolves a suit filed by the Justice Department on behalf of the Environmental Protection Agency (EPA) in 1993. It alleged that the Board’s [Applicant’s] failure to properly operate and maintain its treatment and collection system violated the federal Clean Water Act.” See Exhibit 23.

For some time prior to Katrina, S&WB contracted with Veolia Water North America (Veolia) to maintain and operate the Applicant’s clarifiers. GOHSEP, in its written submittal supporting Applicant’s Request for Arbitration, asserts that “the clear message from the world expert [Veolia] was that the clarifiers were properly maintained prior to the disaster-event, and that but for the disaster-event there would have been no damage to the clarifiers...” According to

GOHSEP, “circumstantial evidence” exists showing that “...Veolia routinely performed required and routine maintenance to the point of the disaster-incident.”⁷

The assertion by GOHSEP that the clarifiers were “properly maintained prior to the disaster-event” by Veolia is cast into doubt in a publication by Public Citizen⁸, which documents a troubled history between Veolia and the Applicant. See Exhibit 24.

A Public Citizen publication entitled “Veolia vs. Veracity” references a “troubled relationship” between Veolia and its worldwide clients, including the Applicant. Specifically, Public Citizen states that “Veolia has a long track record of failing to communicate effectively with New Orleans in connection with Veolia’s wastewater contract. On numerous occasions in recent years, staffers with the New Orleans Sewerage and Water Board made repeated and documented complaints about Veolia reducing staff to inadequate levels, **neglecting preventive maintenance, failing to notify city officials of environmental violation, and other problems** [emphasis added].” Id. at 5-6.

Regarding its pre-disaster failure to maintain, the Applicant argues that post-disaster contracts it has with Onyx International to “clean and restore the entire facility including the Clarifiers...”

⁷ The “circumstantial evidence” offered by GOHSEP includes Veolia’s “economic incentive” to receive an added 10% services charge to maintain “Structures” according to manufacturer specifications. The inference sought to be drawn is that had corrosion of the clarifier components existed prior to the disaster, Veolia had a financial interest in ensuring removal of this corrosion, ergo, corrosion of the components observed by FEMA’s inspection team must be disaster-related. Other “circumstantial evidence” includes Veolia’s tasking by the Applicant to “insure [sic] compliance with the EPA Consent Decree” and its submittal of maintenance records, which “clearly evidence that Veolia dutifully performed all required maintenance at the subject locations.”

⁸ Public Citizen is a national, non-profit consumer advocacy organization founded in 1971 to represent consumer interests in Congress, the executive branch and the courts. Public Citizen’s accomplishments since its founding more than 30 years ago include forcing the carcinogenic product Red Dye #2 off the market, securing the release of the Nixon White House tapes, helping to organize massive protests against the World Trade Organization and publishing the best-selling Worst Pills.

should be construed as proof that its clarifiers were properly maintained prior to the disaster.

FEMA does not dispute that the Applicant's facility had to be dewatered and cleaned after the disaster. In fact, FEMA funded these costs. See Exhibit 8. However, work undertaken to clean and restore the clarifiers after the disaster event is not germane to establishing the pre-disaster condition of the clarifiers, and does not dilute, or even have any bearing on, FEMA's determination that the widespread corrosive damage was not disaster-related.

Based on the foregoing, the Applicant's claim that it has "never been in the habit of deferring maintenance and crucial repairs and strenuously object to any assertion to the contrary" is not credible and should be rejected by this Panel.

III. Post Disaster Lack of Maintenance

FEMA's first appeal response affirmed its previous determination that damage to the steel clarifier components was due to pre-disaster lack of maintenance and was not disaster-related.

The Applicant, in its Request for Arbitration, and GOHSEP, in its written submission, quote excerpts from FEMA's first-level appeal response relating to the Applicant's failure to undertake asset protection measures after the disaster.⁹ There the Applicant and GOHSEP appear to claim that FEMA's determination was faulty due to FEMA's difficulty (more than three years after the disaster event) in distinguishing between disaster-related damage and damage attributable to post-disaster neglect.

⁹Examples of protective measures mentioned in FEMA's first appeal response include sand blasting and application of protective coating.

Emphasis on post-disaster damage in FEMA's first appeal response is attributable to a November 14, 2008, re-inspection that FEMA conducted in response to the Applicant's first-level appeal. During this re-inspection, FEMA observed that the Applicant had not taken any prudent measures to protect its clarifiers from further corrosive damage. The deteriorated condition of the clarifiers made it difficult to distinguish between damage resulting from pre-disaster deferred maintenance and damage resulting from Applicant's failure to undertake post-disaster asset protection measures. Because this re-inspection occurred more than three years after the disaster, FEMA's first-level appeal response concluded, unsurprisingly, that "even if FEMA were to agree that the corrosion was more likely than not caused by Hurricane Katrina, as asserted by the applicant, FEMA cannot determine the extent of disaster-related damage based on the information provided by the applicant in its appeal." See Exhibit 10 at 4. It is worthwhile to recall that it is the Applicant is responsible for showing that damage to their facility is disaster-related. 44 C.F.R. § 206.202(d). It is not FEMA's burden to convince the Panel that the deterioration of a facility is not disaster related, in particular where that untended condition is plainly caused, in significant part, by Applicant's post-disaster neglect. The Applicant appears to suggest that it can bring its facility to ruin after a storm, then claim that FEMA cannot distinguish damage caused due to the Applicant's own negligence from eligible disaster caused damage; therefore, any condition that requires restoration is FEMA's responsibility.

FEMA acknowledges that emphasis in its first-level appeal response on the post-disaster condition of the clarifiers and its inability to determine the exact cause of damage during re-inspection more than three years after the disaster may have caused confusion relative to the basis of its denial of the Applicant's first-level appeal. However, FEMA's rejection of

Applicant's first-level appeal was based on its determination that damage to the steel clarifier components was not disaster-related. The language excerpted from FEMA's first-level appeal response by the Applicant and GOHSEP does not in any way negate FEMA's determination that damage to the steel clarifier components was not disaster-related. Damage attributable to a cause unrelated to a disaster event is ineligible. See 44 C.F.R. 206.223 (a); PA Guide FEMA 322 (1999) at 23.

Lastly, the Applicant issued a "Request for Proposal Clarifier Repairs Phase Two" for clarifier refurbishment - including repair of coatings and corroded parts - with a proposal submittal date of August 15, 2007. See Exhibit 25. More than two (2) years after the Applicant's proposal, and four (4) years after the disaster event, the Applicant has not documented that the work has been completed.

CONCLUSION AND RECOMMENDATION

The Applicant has been unable to show that widespread corrosive damage to its clarifiers is disaster-related and has thus failed to demonstrate that it is eligible for any additional FEMA funding for the repair or replacement of the major steel components of the clarifiers at the EBWTP. FEMA's determination in PW 4031v3 has a reasonable basis and is entitled to deference. FEMA therefore respectfully requests this Panel find in favor of FEMA and deny the Applicant's request for additional Public Assistance funding.

Respectfully submitted on this 17th day of November 2009 by,



John B. Patterson
General Attorney
Office of Chief Counsel
Federal Emergency Management Agency

Attachments

Cc Jason Higginbotham, L.E.M.
Director of Emergency Management
Sewerage and Water Board of New Orleans

Mark Riley
Deputy Director
Governor's Office of Homeland Security and Emergency Preparedness

Gary Jones
Acting Administrator
Federal Emergency Management Agency Region VI

Attachments

- Exhibit 1 – Federal Register Notice of Disaster Declaration
- Exhibit 2 – Aerial photo of EBWTP
- Exhibit 3 – PW 4031, Version 0
- Exhibit 4 – PW 4031, Version 1
- Exhibit 5 – Federal Register Notice increasing cost share from 90% to 100%
- Exhibit 6 – PW 4031, Version 2
- Exhibit 7 – PW 4031, Version 3
- Exhibit 8 – PW 18087
- Exhibit 9 – Applicant First Appeal Request
- Exhibit 10 – FEMA First Appeal Decision
- Exhibit 11 – Second Appeal letter GOHSEP
- Exhibit 12 – Withdrawal letter of appeals SWBNO
- Exhibit 13 – Applicant's Request for Arbitration, Docket No. 1761-FEMA
- Exhibit 14 – Credentials of Alex Greenberg
- Exhibit 15 - Photographs
- Exhibit 16 - Credentials of Gary Durney
- Exhibit 17 – URS Corrosion Control Expert Report
- Exhibit 18 – Conversion charts
- Exhibit 19 – Structural Assessment Report (Draft) Norma Jean Mattei, Ph.D., P.E.
- Exhibit 20 – Complete PW listing for EBWTP
- Exhibit 21 – Hydrogen Sulfide Corrosion Report, EPA, May 1991
- Exhibit 22 – Notice of Civil Action No. 93-3212 (US v. SWBNO Consent Decree)
- Exhibit 23 – EPA News Release regarding Consent Decree
- Exhibit 24 – Public Citizen Report - Veolia v. Expedia
- Exhibit 25 – Bid Specifications for Clarifier Repairs

SUMMARY SHEET

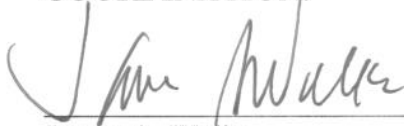
PURPOSE: To provide a formal response to the Sewerage and Water Board of New Orleans Request for Arbitration for the repair and replacement of corrosion damages to major structural steel components of the clarifiers, FEMA-1603-LA, Docket # CBCA 1761-FEMA

DISCUSSION: The Sewerage and Water Board of New Orleans is exercising the option for arbitration established under The American Recovery and Reinvestment Act of 2009 (ARRA), P.L. 111-5.

RECOMMENDATION: Recommend the Assistant Administrator sign the response to the Sewerage and Water Board of New Orleans Request for Arbitration approving the request.

POINT OF CONTACT: Cliff Brown, Executive Officer, PA Division Cliff.brown@dhs.gov or (202) 646-4136.


COORDINATION:



James A. Walke
Director
Public Assistance Division



Date



Office of Chief Counsel



Date

Ann Bertucci
Executive Officer
Disaster Assistance Directorate

Date

Charlie Axton
Acting Deputy Assistant Administrator
Disaster Assistance Directorate

Date

Print this Folder Copy this Folder Jump down to: [Attachments](#) [Assignments](#) **104677**

FolderFolder ID **104677**

From*

Brown, Cliff

To/Owner*

DAD-Public Assistance Division (Group)

Addressed To

Classification* DAD/Public Assistance Division

Subject

Sewerage and Water Board of New Orleans,
FEMA-1603-LA, Docket#CBCA 1761-FEMA. Keyword
Summary

11/17/09(CEW) to C. Brown for review.

Mail Type

Folder Types

(None)

Date Signed

Keyword
Summary
Cont.Created By **Ward, Crystal E. 11/17/2009**Modified By **Ward, Crystal E. 11/17/2009****Dates**

Date Sent*

11/17/2009

Date

Received*

11/17/2009

Date Due

12/02/2009

Date Closed

*Either Compute Now or the system will auto
left blank.*

Attachments There are no Attachments.**Assignments** There are no Assignments.

- WebCIMS 4.2 SP2 - Tuesday, November 17, 2009 - 8:43:38 AM -